FILED
10-31-16
09:56 AM

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	A1505014

RESPONSE TO APPLICATION FOR REHEARING OF DECISION 16-09-002

James L. Duncan
P.O. Box 11092
Santa Rosa, CA 95406-1092
707-528-0586
jlduncan@sonic.net

31 October 2016

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	Application No. 15-05-014

RESPONSE TO APPLICATION FOR REHEARING OF DECISION 16-09-002

I. Introduction

James L. Duncan, a party of record in California Public Utilities Commission (CPUC) Proceeding A15-05-014,[1] respectfully submits, pursuant to CPUC Rules of Practice and Procedure[2] Rule 16.1 (d), this Response to the Application for Rehearing of Decision 16-09-002, filed by the Safety and Enforcement Division (SED) on October 17, 2016 (SED's Application).

II. Discussion

SED's Application asserts that Decision 16-09-002 (Decision) misreads the Blue Line Decision "thereby violating P.U. Code Sections 1757 and 1757.1" (p. 1). SED's Application also asserts that "the Decision's reliance on so-called public interest in place of safety violates California law and Commission precedent in violation of P.U. Code Sections 1757 and 1757.1" (p. 2). These assertions in SED's Application are without merit in many ways. Public Utilities Code[3] §§ 1757 and 1757.1 are mutually exclusive. Section 1757 applies to "a ratemaking ... decision". Section 1757.1 applies to "any proceeding other than a proceeding subject to the standard of

[1] Response of James L. Duncan in support of City of Santa Rosa Application A1505014, filed June 15, 2015.
[2] All following Rule citations are to the CPUC Rules of Practice and Procedure unless indicated otherwise.
[3] All following Code citations are to the Public Utilities Code unless indicated otherwise.

review under Section 1757." Proceeding A15-05-014 (A1505014) has been categorized as a "ratemaking" proceeding[4] and is thus subject to § 1757, but not to § 1757.1, and certainly not to the mutually exclusive §§ 1757 and 1757.1.

SED's Application fails to identify any specific ground of those prescribed by § 1757 (a) for any of its claims of error. Section 1757 defines and limits the scope of appellate court review of CPUC decisions and prescribes the specific grounds upon which a petitioner may seek appellate review. Before seeking appellate review of a CPUC decision, a party must file an application for rehearing which shall set forth specifically the ground or grounds on which the decision is unlawful. No petitioner shall seek appellate review upon any ground not set forth in the application for rehearing (§ 1732). A petition seeking appellate review of a CPUC decision must identify the specific ground of those grounds prescribed by § 1757 (a) for each of the claims of error. An appellate court will not consider assertions of "legal error" where a party has failed to identify the specific ground for each claim of error. (*Utility Consumers' Action Network v. Public Utilities Commission* (2010) 187 Cal. App. 4th 688, 697-698.) SED's Application does not provide any basis for appellate review; consequently, its citation of § 1757 is without merit.

More importantly, although § 1757 (a) does provide the grounds for a party in a CPUC proceeding to seek appellate review of a CPUC decision, it does not follow, however, that SED may ever seek appellate review of a CPUC decision. In *Lynch v. Public Utilities Commission* (2004) 311 B. R. 798 (*Lynch*), two CPUC Commissioners who had cast dissenting votes in a CPUC decision approving a modified settlement agreement (MSA) appealed an United States Bankruptcy Court order implementing the MSA to the United States District Court for the Northern District of California. The *Lynch* court dismissed the appeal of the two CPUC Commissioners on the basis of the appellants' lack of standing (p. 810). The *Lynch* court noted that the United States Supreme Court had "concluded that '[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.' [Citation omitted.] California courts follow a similar approach and generally do not allow a dissenting member of an administrative body to challenge the legality of actions

[4] Resolution ALJ-176 Categorization, May 21, 2015.

taken by that administrative body. See generally *Carsten v. Psychology Examining Cmte. of the Bd. of Medical Quality Assurance,* 27 Cal.3d 793, 166 Cal.Rptr. 844, 614 P.2d 276 (1980); *Braude v. City of Los Angeles,* 226 Cal. App.3d 83, 276 Cal.Rptr. 256 (1990)." (p. 807.)

It is reasonable to believe that the case law cited above would also be controlling regarding the standing of a division, such as SED, of a public agency, such as the CPUC, to seek review of an agency decision made by the agency's decision making body, such as the Commission. If individual Commissioners of the CPUC do not have legal standing to seek review of adopted CPUC decisions, then SED, which is a division of the CPUC and which does not actually vote on adoption of any CPUC decision, should not have standing either. In light of the statutory and case law discussed above, SED's citation of error based on §§ 1757 and 1757.1 is without merit.

SED's Application implicitly argues that the Decision erroneously disregards "safety", e.g.: "The Decision's reliance on so-called public interest in *place of safety* violates California law and Commission precedent... ."; "*giving lip service* to the fact that *safety is paramount*"; "whole range of factors that are not related to *fundamental issues of crossing safety*"; "considering these factors instead of *railroad safety*"; "*safety* is not synonymous with public interest." (Italics added.) (pp. 2-3.) However, the explicit rebuttal to SED's implicit argument is provided in SED's Application: "SED does not dispute that the Commission may find that the at-grade crossing at issue in the Decision may be found to be *adequately safe* and grant the application." (Italics added.) (pp. 2-3.) This is not a new concession; it has long since been established that the at-grade crossing at issue, Jennings crossing, can be improved to be adequately safe at-grade.[5]

As discussed above, SED's assertions of legal error pursuant to §§ 1757 and 1757.1 are without merit. Additionally, except for the single citation to *San Mateo v. Railroad Commission* (1937) 9 Cal 2d 1, which, as discussed repeatedly before, has no relevance to pedestrian and bicycle crossings, SED's Application does not cite any decisional law. SED's Application contains only one citation to the whole record of A1505014 and only three citations to the Decision, and further, as noted above, rebuts its own assertion that the Decision disregards "safety" (p. 2).

[5] Application for Rehearing of Decision 16-09-002, filed by James L. Duncan on October 20, 1916, p. 4. Also see, Decision 16-009-002, pp. 26, 29-30.

The intent behind SED's otherwise inexplicable Application is found in its assertion that the decision is "contrary to state and federal policy disfavoring at-grade crossings ... and the need for grade-separated crossings over mainline railroad tracks (as opposed to light-rail tracks)." (p. 3.) SED's Application does not support this claim with any direct, specific citation to, or quote from, any state or federal policy. However, SED's reference to undefined "state and federal policy" can be understood as a form of code referring to the CPUC's unwritten policy of enforcing a state-wide freeze on new at-grade crossings, which has been discussed previously:[6]

> The record in this proceeding shows that, in the final analysis, SED's overarching purpose is to enforce the "parallel policy" - a "policy of no new at-grade crossings"[7] - "statewide".[8] There are other communities advocating for the creation of pedestrian and bicycle at-grade rail crossings as part of a goal to provide safe alternate routes for convenient and pollution-free transportation, and yet SED recommends denying the City's [Jennings] Application to avoid setting a "bad precedent" for any future applications.[9]

SED's effort to enforce its unwritten policy of imposing a state-wide freeze on new at-grade crossings has caused an extended delay - by now almost five years - in obtaining CPUC approval of an at-grade crossing at Jennings, and the associated unnecessary costs to the taxpayers. Additionally, the City's pedestrians and bicyclists have lost the use of the Jennings crossing for over ten months now since the CPUC ordered it barricaded with a fence during the course of this Proceeding A15-05-014. If SED had not sought to enforce this unwritten state-wide freeze on new at-grade crossings, the construction work to improve the Jennings crossing would have long since been expeditiously and economically completed with a minimum of disruption to the City's residents and to SMART.

In the absence of a showing of cognizable legal error in the Decision, the purpose of SED's Application can only be understood in the context of its effect on other communities which might apply for pedestrian and bicycle crossings. SED effectively demonstrates that it can impose delay through an abuse of procedure on applicants who do not submit to its enforcement of this unwritten state-wide freeze on new at-grade crossings.

---

[6] Reply Issue Brief, filed by James L. Duncan on April 29, 2016, pp. 1-3, 12.
[7] Transcript, p. 199, lines 13-15.
[8] Transcript, p. 194, lines 9-27.
[9] Stewart's Testimony, p. 11, lines 26-28 & p. 12, lines 1-2.

III. Conclusion

For the reasons set forth above, James L. Duncan respectfully urges the Commission to deny SED's Application for Rehearing of Decision 16-09-002.

Dated this 31st day of October, 2016, at Santa Rosa, California.

James L. Duncan
P.O. Box 11092
Santa Rosa, CA 95406-1092
707-528-0586
jlduncan@sonic.net

By /s/ *James L. Duncan*
James L. Duncan